Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

AJITH KUMAR SENANAYAKE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE B. FABACHER
GILL & FABACHER
833 Baronne Street
New Orleans, LA 70113
(504) 522-2800

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Attorney General, in her discretion, is authorized to grant asylum to an alien if the Attorney General determines that the alien is a "refugee". 8 U.S.C. Section 1158. A "refugee" is one who has demonstrated that he is unable to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion". 8 U.S.C. Section 1101(a)(42). The Attorney General's ultimate decision whether to grant or deny a refugee asylum must be upheld absent a showing that such action was arbitrary, capricious or an abuse of discretion. *Adebisi v. I.N.S.*, 952 F.2d 910, 914 (5th Cir. 1992).

Section 212(c) of the Immigration and Nationality Act provides that aliens admitted for permanent residence who have maintained a lawful unrelinquished domicile in the United States for seven consecutive years may, in the Attorney General's discretion, be permitted to continue residing in the United States notwithstanding their deportability under sections of the Act. 8 U.S.C. 1182(c). Applicants for a 212(c) waiver who have been convicted of serious drug offenses must show unusual or outstanding equities. *Dias-Resendez v. I.N.S.*, 950 F.2d 493, 496 (5th Cir. 1992). Review of the Attorney General's decision in denying or granting waivers is limited to an abuse of discretion standard. *Ashby v. I.N.S.*, 961 F.2d 555, 557 (5th Cir. 1992).

QUESTIONS PRESENTED – Continued

The questions presented are:

1) Whether the ruling of the Board of Immigration Appeals in the present case denying the Petitioner's application for asylum was an abuse of discretion.

2) Whether the ruling of the Board of Immigration Appeals in the present case denying the Petitioner's application for an INA Section 212(c) waiver was an abuse of discretion.

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Ajith Kumar Senanayake, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on April 13, 1994.

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered April 13, 1994, are reprinted in the Appendix to this Writ at pages App. 1 through App. 7. The decision and order of the Board of Immigration Appeals, dated August 30, 1993, are reprinted in the Appendix to this Writ at pages App. 8 through App. 16. The order and oral decision of the Immigration Judge, dated August 24, 1988, are reprinted in the Appendix to this Wri. at pages App. 17 through App. 24. The order and oral decision of the Immigration Judge, dated December 1, 1988, are reprinted in the Appendix to this Writ at pages App. 25 through App. 35.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 13, 1994, affirming the Board of Immigration Appeals' decision dated August 30, 1993. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(a) and Sup. Ct. R. 20.1.

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the United States Code:

Title 8 U.S.C. Sect. 1101(a)(42)[1]

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

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[1] Referred to throughout this Writ as Section 101(a)(42)(a) of the Immigration and Nationality Act.

Title 8 U.S.C. Section 1158[2]

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(b) Termination of asylum by Attorney General; criteria

Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.

(c) Status of spouse or child of alien granted asylum

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under subsection (a) of this section, may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

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[2] Referred to throughout this Writ as Section 208 of the Immigration and Nationality Act.

(d) Aliens convicted of aggravated felony

An alien who has been convicted of an aggravated felony, notwithstanding subsection (a) of this section, may not apply for or be granted asylum.[3]

Title 8 U.S.C. Section 1182(c)[4]

Nonapplicability of subsection (a)(1) to (25), (30) and (31)

Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.[5]

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[3] Title 8 U.S.C. Section 1158(d) had not been enacted at the time that the Petitioner applied for asylum. However, throughout the course of these proceedings, the Immigration and Naturalization Service has never alleged that the Petitioner is an aggravated felon.

[4] Referred to throughout this Writ as Section 212(c) of the Immigration and Nationality Act.

[5] The last sentence of Title 8 U.S.C. Section 1182(c) had not been enacted at the time that the Petitioner applied for his

Title 8 U.S.C. Section 1251(a)(2)(B)(i)[6]

(B) Controlled substances

(i) Conviction

Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Ajith Kumar Senanayake herein seeks review of the decision by the United States Court of Appeals for the Fifth Circuit on his Petition for Review taken from the administrative decision by the Board of Immigration Appeals (hereinafter "BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under 8 U.S.C. Section 1105a(a), which establishes the exclusive

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section 212(c) waiver. However, throughout the course of these proceedings, the Immigration and Naturalization Service has never alleged that the Petitioner is an aggravated felon nor did the Petitioner serve a term of imprisonment of 5 or more years.

[6] Referred to throughout this Writ as Section 242(a)(11) of the Immigration and Nationality Act.

procedure for judicial review of such administrative decisions.

II. Statement of Facts

Ajith Kumar Senanayake (hereinafter "Mr. Senanayake" or the "Petitioner") is a thirty-eight year old divorced male native and citizen of Sri Lanka. Mr. Senanayake first came to the United States in 1978 and received lawful permanent residence status on February 19, 1981, on the basis of his marriage to a United States citizen. After his marriage, Mr. Senanayake and his wife had a United States citizen son, who is now thirteen years of age. Mr. Senanayake became separated from his wife at the time of his incarceration and is now divorced from her. Mr. Senanayake is presently remarried to a United States citizen.

On November 6, 1981 Mr. Senanayake was convicted in the United States District Court for the Middle District of Louisiana of conspiracy to possess with intent to distribute opium. Mr. Senanayake was sentenced to ten years imprisonment but was only required to serve three (3) years after which time he was placed on parole. In 1982, Mr. Senanayake was placed in deportation proceedings.

The evidence presented at the hearings demonstrated that other than the conviction discussed above, Mr. Senanayake has no criminal record in either this country or his native country. Additionally, the testimony indicated that Mr. Senanayake's criminal counsel failed to advise him of the immigration consequences of his pleading guilty to the charges discussed above. Mr. Senanayake's

criminal counsel also informed him that the criminal court Judge was aware that he was not an intricate part of the group that committed the crime and that, accordingly, his sentence would probably reflect same. Based on these representations, Mr. Senanayake pled guilty. At his immigration proceedings he testified that had he known the immigration consequences of pleading guilty and had he known that the Judge was ***not*** aware of his minimal involvement in the conspiracy he never would have pled as he did. Further, Mr. Senanayake testified that during his incarceration he was a model prisoner and that he complied with all of the conditions of his parole.

Mr. Senanayake has always been a productive member of society who has worked to support himself and his family. He continues to do so now. Mr. Senanayake supports his son and has a meaningful, ongoing relationship with him. This is particularly important in light of the fact that the boy is now a young adolescent.

Further, the evidence demonstrated that Mr. Senanayake was the member of a prominent political family in Sri Lanka that was actively involved in the UNP political party. As a result of these activities, the Respondent's father was assassinated in Sri Lanka by the JVP political party. This was the result of his father's involvement with the UNP political party. The Respondent told the court that while living in Sri Lanka, he was shot at by the JVP while riding in a van. Mr. Senanayake also testified that while he lived in Sri Lanka, he was abducted by members of the JVP party, interrogated and tortured and believes that he too would have been killed but for the fact that he was able to escape.

III. Course of Proceedings and Disposition in the Court Below.

An Order to Show Cause dated June 16, 1982 was issued by the Immigration and Naturalization Service (hereinafter "INS") which charged that the Petitioner was deportable pursuant to Immigration and Nationality Act (hereinafter "INA") Section 242(a)(11) for having been convicted of a conspiracy to violate any law or regulation relating to the illicit possession of narcotic drugs in violation of Title 21, Section 846 of the United States Code.

On August 24, 1988 Mr. Senanayake admitted the allegations in the Order to Show Cause, conceded deportability and stood mute as to the country of deportation. The Immigration Court designated Sri Lanka as the country of deportation if that became necessary. The Immigration Judge found that the Petitioner was deportable as charged. Mr. Senanayake then asked for relief pursuant to INA Section 212(c) and INA Section 208.

As the hearing on August 24, 1988 was the result of a Motion to Reopen, the appropriate applications had previously been filed with the Immigration Court. The Court granted the Petitioner thirty (30) days to amend his I-589 and then have it submitted to the State Department. The hearing on the merits on the request for relief pursuant to Section 212(c) of the INA was conducted on August 24, 1988. At this hearing, the Order to Show Cause, I-191 and the Motion to Reopen were admitted as Exhibits 1, 2 and 3 respectively to the record of proceeding. At that time, the Court granted the Motion to Reopen.

At this hearing, the Petitioner testified in support of his application. During the Petitioner's testimony, the

Court admitted Mr. Senanayake's son's birth certificate as Exhibit 4 to the record of proceeding. Also testifying on the Petitioner's behalf was Mr. Johnny C. Moore, an attorney-at-law, who was aware of the circumstances involving the Respondent's criminal conviction. At the conclusion of the hearing, the Immigration Judge denied Mr. Senanayake's application for relief pursuant to INA Section 212(c). Mr. Senanayake reserved his right to appeal. The Court then set the hearing for the merits on Mr. Senanayake's application for political asylum and withholding of deportation for December 1, 1988.

The hearing on the merits on the request for relief pursuant to Section 208 of the INA was conducted on August 24, 1988. At this hearing, the original I-589, the BHRA letter dated November 4, 1988, the amended I-589 and the BHRA letter dated June 16, 1987 were admitted as Exhibits 5, 6, 7 and 8 respectively to the record of the proceeding. Mr. Senanayake testified in support of his application. Also testifying on the Petitioner's behalf was Hema Kumari Senanayake, the Petitioner's mother. At the conclusion of the hearing, the Immigration Judge denied Mr. Senanayake's application for relief pursuant to INA Section 208. Mr. Senanayake reserved his right to appeal.

On December 12, 1988 the Petitioner filed his Notice of Appeal and Brief in Support of Notice of Appeal with the Office of the Immigration Judge. With his Notice of Appeal, Mr. Senanayake requested a copy of the transcript of the proceedings and thirty days from receipt thereof to file a Supplementary Brief on Appeal. Pursuant to an extension of time granted by the Office of the Immigration Judge, the Petitioner's Brief on Appeal was

filed on March 30, 1990. The Government filed its Brief on April 10, 1990. On August 30, 1993, the Board of Immigration Appeals rendered its decision dismissing the Petitioner's appeal.

The Petition for Review was filed with the United States Court of Appeals for the Fifth Circuit on September 28, 1993. The Petitioner's Brief was submitted to the Fifth Circuit on January 3, 1994. The Government submitted its Brief on March 5, 1994. On April 13, 1994 the Order and Opinion of the Fifth Circuit was entered denying the Petitioner's appeal. Pursuant to Federal Rule of Appellate Procedure 41 the Fifth Circuit's mandate was scheduled to issue fourteen (14) days from the date that the Petition for Review was denied. On April 19, 1994, the Petitioner filed a Motion To Stay Issuance of Mandate. On May 1, 1994 the Fifth Circuit stayed the Mandate in the case to and including May 30, 1994.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. AT THE HEARING ON THE MERITS THE PETITIONER TESTIFIED SPECIFICALLY AND CONSISTENTLY REGARDING HIS EXPERIENCES IN SRI LANKA AND HIS FAMILY'S POLITICAL ACTIVITIES, HIS FATHER'S ASSASSINATION AND HIS OWN ABDUCTION, INTERROGATION AND TORTURE BY THE JVP. THE PETITIONER'S TESTIMONY REPRESENTED EVIDENCE SO COMPELLING THAT NO REASONABLE FACTFINDER COULD FAIL TO FIND THE REQUISITE FEAR OF PERSECUTION.

In order to have a successful political asylum claim the applicant must prove that he is a "refugee" within the

meaning of Section 101(a)(42)(a) of the Immigration and Nationality Act. That section defines a refugee as any person outside his country of nationality or habitual residence who is unwilling to return to that country because of persecution due to "race, religion, nationality, membership in a particular social group, or political opinion."

The United States Supreme Court has held that a "well-founded fear" is different from and less than the standard of proof governing applications for withholding of deportation under Section 243(h) of the Immigration and Nationality Act. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). It is in this context that the courts are required to assess an applicant's plea for asylum.

The Court in *Cardoza-Fonseca* stated a two-pronged test for the "well-founded fear" standard. The Court stated that the alien must show both that he has a subjective fear and that, secondly, this fear has enough of a basis to be well-founded. *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1561, 1579 (9th Cir. 1986). Further, when applying this test, as fears are a state of apprehension not usually subject to rational measurement, a finding that the Respondent was candid, credible or sincere in his or her testimony and demonstrated a genuine fear of persecution renders the conclusion that the Respondent has met the first prong of the test. *Blanco-Comarribas v. I.N.S.*, 830 F.2d 1039 (9th Cir. 1987). According to *Blanco-Comarribas*, the second prong requires objective analysis. As stated by the Court there must be some basis for it in the reality of the circumstances. Further, as noted by the court, "If documentary evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and refers to 'specific facts that give rise to an inference that

the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds' listed in section 208(a)" *Blanco-Comarribas* at 1042-43 (quoting *Cardoza-Fonseca*, 767 F.2d at 1453 quoting *Carvajal-Munoz v. I.N.S.*, 743 F.2d 562, 574 (7th Cir. 1984)).

Following *Cardoza-Fonseca*, the BIA has determined that asylum may be proved where a " . . . reasonable person in his circumstances would fear persecution." *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The BIA takes the view that the applicant must show that his fear of persecution is both subjectively genuine and objectively reasonable. The objective component requires a showing by credible, direct and specific evidence of facts supporting a reasonable fear and therefore an applicant must show that: (1) s/he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is aware or could become aware that the applicant possesses this belief or characteristic; (3) the persecutor has the capability of punishing the applicant; and (4) the persecutor has the inclination to punish the applicant. *Id.*

The Petitioner takes the position that pursuant to the standard set forth above he met his burden of proof and that the Fifth Circuit erred in dismissing his Petition for Review. The Fifth Circuit was obligated pursuant to the standard set forth above to note that the Board of Immigration Appeals should have reversed the denial of the Petitioner's political asylum claim because the Immigration Judge stated that he denied the claim because the Respondent could not "prove" that the party that shot at him and later kidnapped and tortured him was the JVP

party. The Immigration Judge stated in his Oral Decision that, "The respondent concluded, without further substantiation, that he was shot at by members of the JVP party . . . And the Court questions whether the kidnapping was the result of coming across him just inadvertently and whether they were detaining him for his money or for his political party; the answers are not clear." However, the Immigration Judge failed to consider that the Petitioner was a member of a politically prominent and active family and that the Petitioner's father was assassinated by the JVP party. Thus, although Mr. Senanayake could not "prove" it in the legal sense of the word, it stands to reason based upon his family's political history and his knowledge of the JVP's tactics that he would be able to conclude that it was they who shot at him and kidnapped him.

Thus, the Immigration Judge failed to properly consider the evidence that had been presented and imposed an additional burden on the Petitioner, a burden which is not otherwise required under the law, by insisting that the Petitioner prove that it was the JVP who shot at him on one occasion and kidnapped him and tortured him on another in order to have his political asylum application allowed. Without giving the appropriate weight to the evidence presented above, the Immigration Judge concluded that the Petitioner's fears of persecution if he returned to Sri Lanka were not such that a reasonable man would fear persecution given the same circumstances. To reach such conclusions without considering all of the evidence before him is clearly not warranted

and is contrary to the law. The Immigration Judge's finding in this regard, and his subsequent denial of the Petitioner's application, was clearly erroneous. The Board of Immigration Appeal's dismissal of the Petitioner's appeal and the Fifth Circuit's denial of his Petition for Review were clearly erroneous and represented an abuse of discretion.

II. THE IMMIGRATION JUDGE ABUSED HIS DISCRETION WHEN HE DENIED SECTION 212(c) RELIEF TO MR. SENANAYAKE. THE IMMIGRATION JUDGE FAILED TO ADEQUATELY DISCUSS AND EVALUATE ALL THE EQUITIES PRESENTED BY MR. SENANAYAKE.

Mr. Senanayake applied for relief from deportation under Section 212(c) of the Immigration and Nationality Act and contends that he is entitled to this relief based on the fact that he presented extensive favorable evidence and that it was acknowledged by the Board of Immigration Appeals and the Fifth Circuit that he had presented outstanding and unusual equities. Based on these findings the Fifth Circuit erred in denying Mr. Senanayake's Petition for Review and failing to find that an abuse of discretion had taken place given the facts and circumstances of the case and given that the Immigration Judge had committed a substantial error when he found that no unusual or outstanding equities existed.

INA Section 212(c) provides for discretionary relief from deportation for a permanent resident alien who has been lawfully domiciled in the United States for more than seven years. *Ashby v. I.N.S.*, 961 F.2d 555, 557 (5th Cir. 1992). When deciding whether to grant Section 212(c) relief from deportation, " . . . the Immigration Judge must

balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf. . . . " *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). Thus, the Immigration Judge must consider and evaluate *all* factors favorable to the alien, including family ties in the United States, duration of residence in this country, the alien's age when he immigrated, the potential hardship that deportation would impose upon the alien and his family, the alien's history of employment, and evidence that a convicted alien has been rehabilitated. *Id.* As the negative factors grow more serious, such as conviction for a serious crime, the applicant for relief must show additional offsetting favorable evidence, which may involve unusual or outstanding equities. *Id.* at 585. The Fifth Circuit has also held that, "Applicants for discretionary relief who have been convicted of serious drug offenses must show unusual or outstanding equities". *Dias-Resendez v. I.N.S.*, 960 F.2d 493, 496 (5th Cir. 1992).

In the case at bar, the Immigration Judge found that Mr. Senanayake failed to demonstrate unusual or outstanding equities and denied the Petitioner's request for an INA 212(c) waiver on the basis of the seriousness of his drug conviction. In its decision denying the Petitioner's Petition for Review, the Fifth Circuit found that it agreed with the Board of Immigration Appeals that the equities presented by the Petitioner, considered cumulatively, " . . . rise to the level of the unusual and outstanding." Nonetheless the decision of the Immigration Judge was not reversed because the Board found that based on the " . . . stern ten year prison sentence" which Mr. Senanayake received for the criminal conviction, the

positive equities did not outweigh the serious nature of his drug conviction.

The Petitioner contends that having found that unusual or outstanding equities existed in his case, the Fifth Circuit failed to recognize and properly evaluate the strength of these equities and find that the Immigration Judge had abused his discretion when he denied the waiver based on the nature of Mr. Senanayake's conviction. A proper determination as to whether Mr. Senanayake demonstrated unusual or outstanding equities significant enough to overcome the seriousness of his crime can be made only after a complete review of the favorable factors in his case. *Matter of Edwards,* Interim Dec. 3134 (BIA 1990). In his Oral Decision, the Immigration Judge discussed some of the positive factors enumerated in *Marin* and present in Mr. Senanayake's case, but did not give them their due weight in the balancing process. Moreover, other important factors were not discussed at all by the Immigration Judge in his explanation of the balancing tests he is required to perform. These same factors were ignored by the Fifth Circuit in its review of the Board of Immigration Appeals decision. Particularly, the Immigration Judge did not discuss or consider the fact that Mr. Senanayake was not advised by his criminal counsel regarding the immigration consequences of pleading guilty to the criminal charge. Further, his criminal counsel misrepresented the criminal court Judge's knowledge of his involvement in the conspiracy. This is particularly important since Mr. Senanayake presented corroborating testimony from an attorney-at-law familiar with the facts of his criminal case and his criminal counsel. The corroborating testimony

demonstrated that Mr. Senanayake was led to believe that he would receive probation for his offense and be able to continue on with his life assuming that he did not commit any further criminal acts. Given that the Immigration Judge denied the Petitioner's 212(c) waiver based on a finding that his crime was serious and that the Fifth Circuit found that although he had "unusual and outstanding equities" that the fact that he was given a ten year prison sentence for his crime negated these equities, this evidence and its lack of acknowledgement by the Fifth Circuit is compelling.

Further, the Fifth Circuit failed to acknowledge that the Board of Immigration Appeals did not address the fact that the Immigration Judge did not give due weight to the issue of Mr. Senanayake's rehabilitation and the fact that he has never had any other criminal convictions and was a model prisoner.

As demonstrated in the argument above, the Immigration Judge failed to adequately weigh the positive equities in Mr. Senanayake's case. In addition to the Immigration Judge's failure to mention in his decision Mr. Senanayake's lack of any criminal activity and his misrepresentation by his criminal counsel, the judge gave short shift to the fact that Mr. Senanayake has a United States citizen child who will never see him again if he is deported. Further, all of his family resides in this country except for one brother with whom he has not had any contact. This alone creates exceptional incentive for an Immigration Judge to grant Section 212(c) relief. When combined with the factors discussed by the Immigration Judge and Mr. Senanayake's rehabilitation, as found by the Fifth Circuit and Board of Immigration Appeals,

unusual and outstanding equities do exist. Had the additional factors been properly weighed by the Fifth Circuit the conclusion should have been reached that the positive equities far outweigh the adverse considerations in Mr. Senanayake's case.

Further, the Petitioner contends that the Fifth Circuit should have noted that the Immigration Judge gave undue weight to Mr. Senanayake's criminal conviction in rendering his decision on his request for Section 212(c) relief. The Immigration Judge's Oral Decision shows an abhorrence towards Mr. Senanayake's misconduct that no equities could overcome. Case law recognizes that a particularly serious crime can be forgiven under 212(c) when outstanding or unusual equities are present. See, *Dias-Resendez, supra* at 496. The BIA has suggested that even a respondent who actually commits the crime of murder may possess unusual or outstanding equities which overcome this offense. *Matter of Rodriguez Vera*, 17 I&N Dec. 105, 107 (BIA 1979).

The Immigration Judge clearly suggested that no equity, however favorable, would ever outweigh Mr. Senanayake's offense. By doing so, the Immigration Judge improperly placed an insurmountable burden of proof on Mr. Senanayake because of the nature of his misconduct. Undoubtedly, the learned and conscientious judge took his duties seriously in this matter, but it does not appear that he was able to overcome his abhorrence of the nature of the 1981 conviction. The Immigration Judge's abuse of discretion in this regard has prematurely closed the door on Mr. Senanayake's Section INA 212(c) application for relief from deportation. The Fifth Circuit erred in failing to find that the Board of Immigration Appeals should

have reversed the decision of the Immigration Judge based on his failure to follow the appropriate caselaw in evaluating the burden of proof necessary for a INA Section 212(c) waiver.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAWRENCE B. FABACHER, III
GILL & FABACHER
833 Baronne Street
New Orleans, LA 70113
(504) 522-2800

Attorney of Record for Petitioner Ajith Kumar Senanayake

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5347
Summary Calendar

AJITH KUMAR SENANAYAKE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
IMMIGRATION AND NATURALIZATION SERVICE
(A36 930 038)
(Filed April 13, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Ajith Kumar Senanayake challenges an order of the Board of Immigration Appeals, contending that he demonstrated his eligibility for asylum and for a waiver of deportability. His petition is **DENIED.**

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Senanayake, a native and citizen of Sri Lanka, came to the United States in 1978, and received lawful permanent resident status on February 19, 1981, on the basis of his marriage to a United States citizen. Shortly thereafter, on November 6 of that year, in the United States District Court for the Middle District of Louisiana, he pleaded guilty to conspiracy to possess with the intent to distribute opium and was sentenced to ten years imprisonment. He was paroled in November 1984.

An order to show cause was issued on June 16, 1982, charging that Senanayake is deportable under § 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(B)(i), because of his conviction. At a hearing in August 1988, Senanayake conceded deportability and requested asylum, withholding of deportation, and a waiver of deportability. After an evidentiary hearing in December 1988, the Immigration Judge denied the requested relief and ordered Senanayake deported to Sri Lanka. In August 1993, the Board of Immigration Appeals sustained that order.

II.

A.

Section 208 of the Immigration and Nationality Act authorizes the Attorney General, in her discretion, to grant asylum to an alien if the Attorney General determines that the alien is a "refugee". 8 U.S.C. § 1158. A "refugee" is one who has demonstrated that he is unable to return to his native country " 'because of persecution

or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion' ". *Castillo-Rodriguez v. I.N.S.*, 929 F.2d 181, 184 (5th Cir. 1991) (quoting 8 U.S.C. § 1101(a)(42)). If the applicant fears persecution by a particular group, rather than the government, he must show that the group is one that "the government is unable or unwilling to control". *Adebisi v. I.N.S.*, 952 F.2d 910, 914 (5th Cir. 1992).

"The Attorney General's ultimate decision whether to grant or deny a refugee asylum . . . must be upheld absent a showing that such action was arbitrary, capricious or an abuse of discretion". *Id.* at 912 (internal quotation marks and citation omitted). In order to obtain reversal, Senanayake "must show that the evidence he presented was so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution". *I.N.S. v. Elias-Zacarias*, ___ U.S. ___, 112 S. Ct. 812, 817 (1992).

In support of his asylum claim, Senanayake asserted that he feared that he would be killed by "Communist and Tamil rebels" if he returned to Sri Lanka. He presented evidence that his family had been associated "very strongly" with the United National Party, the governing political group in Sri Lanka; that, while campaigning to return to parliament in the 1970 elections, his father was assassinated by the Janatha Vimukthi Peramuna[2] (JVP), a communist terrorist group; that from 1969-1972, while attending college, he was the vice president of an anti-

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[2] Sinhalese for "People's Freedom Party".

communist student organization that informed on JVP members, and was personally responsible for the apprehension of a JVP leader, who later was shot; and that he had received death threats because of his involvement in the student group and his family's political activities. Senanayake testified that in 1972, while riding in a van with a friend, "communists" shot at him. He believed that communists were responsible "because at that time they [were] right there", and because they attacked a police station that same evening. He also testified that in April, May, or June 1972, while on a hunting trip with a friend, he was kidnapped, held in a roofless bamboo cage for three to five days, interrogated, and tortured by the JVP. Senanayake testified that he escaped when the police attacked the camp.

Senanayake admitted that he remained in Sri Lanka until 1974, and had no further problems with the JVP, the Tamil rebels, or the communists. He maintained that the terrorists had been subdued by the Sri Lankan government and were dormant during the time he remained in Sri Lanka, after he escaped from his captors, but that they had regained power. Senanayake conceded that his three sisters, who still live in Sri Lanka, "are doing okay".

The Board concluded that, even assuming, *arguendo*, that the JVP targeted Senanayake on account of his political opinion, he had not shown that the Sri Lankan government was either unwilling or unable to protect him. The Board noted that government forces were successful in tracing him following his abduction, and that they had enabled him to escape by attacking the JVP camp. Noting that Senanayake had been away from Sri Lanka for 19

years, the Board stated that he had not offered any evidence to support his allegation that the JVP had regained sufficient power to enable it to search out individuals such as himself.

Senanayake did not sustain his burden of presenting evidence "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution". Therefore, the Board did not abuse its discretion in denying his request for asylum.

B.

The Board also determined that Senanayake was not eligible for a waiver of deportability under § 212(c) of the Act, 8 U.S.C. § 1182(c). That section provides that "aliens admitted for permanent residence who have maintained a lawful unrelinquished domicile in the United States for seven consecutive years may, in the Attorney General's discretion, be permitted to continue residing in the United States notwithstanding their deportability under other sections of the Act". *Ashby v. I.N.S.*, 961 F.2d 555, 557 (5th Cir. 1992). "Applicants for discretionary relief who have been convicted of serious drug offenses must show unusual or outstanding equities". *Dias-Resendez v. I.N.S.*, 960 F.2d 493, 496 (5th Cir. 1992) (internal quotation marks omitted). "[T]he Attorney General has unusually broad discretion in granting and denying waivers". *Ashby*, 961 F.2d at 557. Accordingly, "our review of the Board's decision is severely limited". *Id.*

The Board considered as "positive equities" the facts that Senanayake has lived in the United States since 1978, and was granted lawful permanent resident status in

1981; that he has strong family ties in the United States, including a mother and sister who are lawful permanent residents and a child who is a United States citizen;[3] that he has a history of employment and owns an interest in a gem business; that he served his prison sentence without incident, was employed during his imprisonment, and has abided by the terms of his parole; and that Sri Lanka is embroiled in a civil war. The Board found that these equities, considered cumulatively, "rise to the level of the unusual and outstanding".

The Board concluded, however, that the positive equities were outweighed by Senanayake's 1981 conviction, which it characterized as a "grave offense". Although the Board noted that Senanayake had sought to minimize his role in the opium conspiracy, it stated that it could not "ignore the fact that the United States district court judge who presided over the criminal proceedings saw fit to impose a stern 10-year prison sentence". And, the Board pointed out that Senanayake was arrested on the opium conspiracy charges in July 1981, only five months after being granted lawful permanent resident status.

The Board adequately considered the equities involved, "balancing the social and humane considerations in [Senanayake's] favor against the adverse

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[3] The Board noted that Senanayake also is married to a United States citizen, but found that the weight of that factor is "undercut by the fact that he is separated from his spouse". (Senanayake states in his brief that he is divorced.)

factors".[4] *Ashby*, 961 F.2d at 557. It did not abuse its discretion.

III.

For the foregoing reasons, the petition for review is **DENIED.**

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[4] Senanayake contends that the Immigration Judge failed to discuss the facts that his counsel did not advise him of the immigration consequences of pleading guilty, misrepresented to him the district judge's knowledge of his involvement in the conspiracy, and led him to believe that he would receive probation. We review only the decision of the Board, not the decision of the Immigration Judge. *See Adebisi*, 952 F.2d at 912. The Board's decision reflects that it considered these factors.

Date: AUG 30 1993

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A36 930 038 – New Orleans

In re: AJITH KUMAR SENANAYAKE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Lawrence B. Fabacher II, Esquire
Gill & Fabacher
833 Baronne Street
New Orleans, Louisiana 70113

ON BEHALF OF SERVICE: Richard Robinson
General Attorney

CHARGE:
Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] – Convicted of controlled substance violation

APPLICATION: Asylum; withholding of deportation; waiver of inadmissibility

ORDER:

PER CURIAM. In decisions rendered on August 24 and December 1, 1988, the immigration judge found the respondent deportable pursuant to the charge set forth above, based upon his admissions.[1] Further, the immigration judge denied his various applications for relief from

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[1] Although not applicable to the case at hand, the grounds of deportability were revised and renumbered by section 602 of

deportation: a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c); asylum and withholding of deportation under sections 208(a) and 243(h) of the Act, 8 U.S.C. §§ 1158(a) and 1253(h); and voluntary departure under section 244(e) of the Act, 8 U.S.C. § 1254(e). The respondent, through counsel, has appealed from that decision, but only with respect to the denial of section 212(c), asylum, and withholding relief. For its part, the Immigration and Naturalization Service contends that the appeal should be dismissed.

The record reflects that the respondent is a 37-year-old native and citizen of Sri Lanka, who raised a fear of returning to that country. He explained that he was from a prominent political family which supported the United National Party ("UNP"). He advised that his father was a member of parliament who opposed the Janatha Vimukthi Peramuna ("JVP"), a violent Communist organization which sought to overthrow the government. He related that his father was assassinated during the 1969 election campaign and that his family suspected the JVP.

The respondent indicated that he himself was a leader of a student group which informed on various radical elements, including the JVP. He indicated that many JVP cadres were arrested and executed as a result. He declared that he was personally responsible for the apprehension of a JVP leader, who was later shot. He

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the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5077 (1990). *See Matter of Papazyan*, Interim Decision 3186 (BIA 1992).

noted that because of this fact and his family's political background, he began to receive death threats.

The respondent testified that in 1972 he was the target of two violent incidents. He explained that the first episode occurred when he was shot at while riding in a van with a friend. He attributed this action to the JVP, as that faction attacked a local police station immediately thereafter. He further recalled that later that same year, he and a friend were kidnapped by JVP cadres while on a hunting trip. The respondent advised that he was immediately recognized as a member of a prominent political family and that he was interrogated about certain relatives and their movements. He related that he was kept in a cage for part of the time and was tortured. He indicated that he managed to escape when the security forces, which had come in search of him attacked the JVP encampment.

The respondent declared that the Sri Lankan Government successfully suppressed the JVP's general uprising and that, as a result, the radicals became dormant for the next few years. He recalled that he remained in the country for 1½ to 2 years before leaving with the merchant marine in November 1974. he recounted that in approximately 1976, the authorities freed various JVP leaders, who then went into hiding in Sri Lanka and abroad. THe respondent asserted that the JVP has regained its power. He noted that he lost contact with his brother who worked as a policeman in Sri Lanka.

In addition to his own statements, the respondent presented various personal and background documents in support of his persecution claim. This evidence

included letters from the two friends involved in the 1972 incidents. In addition, his mother testified in his behalf. She generally corroborated his story and added that her son would be unsafe in any area of the country because of the widespread influence of the JVP. She also noted that the respondent's brother, the policeman, had been shot at.

According to the respondent, after a number of years in the merchant marine, he began living in the United States in 1978. He advised that he was granted lawful permanent resident status in February 1981. He acknowledged that in November 1981 he was convicted in United States district court of conspiracy to possess with intent to distribute opium. He indicated that he was sentenced to 10 years in prison and that he was paroled in November 1984.

The respondent testified that he is married to a United States citizen from whom he is separated. He advised that he has a United States citizen child whom he regularly visits and supports. In addition, he related that his mother and a sister reside in this country as lawful permanent residents.

According to the respondent, his 1981 conviction was his sole criminal offense. He recounted that he played a minimal role in the controlled substance trafficking conspiracy and that he pled guilty on the advice of counsel who had speculated that he would receive probation. He declared that, in any event, he was a model prisoner and that he has complied with the conditions of his parole.

The respondent recounted that he has consistently worked while in the United States, including during his

incarceration. He testified he currently is employed in a gem business, in which he apparently owns an interest.

(ASYLUM AND WITHHOLDING OF DEPORTATION)

After careful de novo review, we conclude that the respondent has failed either to demonstrate a well-founded fear of persecution in Sri Lanka or to establish a claim of past persecution sufficient to merit a grant of asylum. *See* section 208(a) of the Act; section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.5 (1980 asylum regulations); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (asylum standard more generous than withholding standard); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) ("reasonable person" definition of well-founded fear asylum standard); *Matter of Chen*, Interim Decision 3104 (BIA 1989) (past persecution).

Assuming, *arguendo*, that the JVP targeted the respondent in 1972 on account of his political opinion, or any of the other protected grounds, he has not made the required showing that the Sri Lankan Government was either unwilling or unable to protect him from that faction. *See Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975). Although he summarily claimed that the security forces could offer no assistance, we consider that they succeeded in tracing him following his abduction and that they enabled him to escape by attacking the JVP base. Moreover, as we observed in a recent precedent decision dealing with Sri Lanka, the government has brutally suppressed the JVP. *See Matter of T-*, Interim Decision 3187, at 8 (BIA 1992). The respondent has failed to offer any background documentation to support his allegation that

the JVP has regained sufficient power so as to be able to search out individuals in circumstances similar to his own. *See Matter of Dass*, Interim Decision 3122, at 7-8 (BIA 1989). We point out that he has now been away from Sri Lanka for some 19 years.[2]

Even assuming that the respondent's previous experiences in Sri Lanka amounted to past persecution, it is not established that he presently merits a grant of asylum. In *Matter of Chen, supra*, at 5, we stated that in certain circumstances past persecution alone might warrant a grant of asylum even if there was no reasonable likelihood of present persecution. For instance, asylum could be granted if the past persecution had been so severe that return to the country of persecution would be inhumane. *Id.* Even if past persecution had been established in the instant case, we would not conclude from our independent review of the record that there are humanitarian or compelling bases that presently warrant a grant of asylum. In this regard, we note that while the respondent asserted that he was tortured by the JVP, he offered no details as to the nature or extent of the abuse. Further, we have considered all of the other positive and negative factors listed in our analysis of his application for section 212(c) relief. *See infra* at pp. 5-6.

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[2] The respondent also raises a general fear of harm from Tamil radicals, apparently due to the fact that he had informed on their comrades during his time in college. However, he failed to offer any persuasive evidence that Tamil militants ever attempted to seek retribution or that they were even aware of his activities.

Inasmuch as the respondent has failed to satisfy the more generous asylum standard in regard to prospective harm, it follows that he also has failed to establish eligibility for withholding of deportation under the clear probability standard. *See Rodriguez-Rivera v. INS*, 848 F.2d 998, 1007 (9th Cir. 1988). The evidence does not demonstrate that it is more likely than not that the respondent would be persecuted in Sri Lanka on account of any of the relevant grounds. *See* section 243(h) of the Act; 8 C.F.R. § 242.17(c) (1961 withholding regulations, as amended prior to July 27, 1990); *INS v. Stevic*, 467 U.S. 407 (1984) (withholding standard). In the alternative, we rule that he is statutorily ineligible for withholding relief inasmuch as his 1981 controlled substance trafficking offense constitutes a particularly serious crime. *See* section 243(h)(2)(B) of the Act; *Matter of Gonzalez*, 19 I&N Dec. 682, 683-84 (BIA 1988), *modified on other grounds, Matter of C-*, Interim Decision 3180 (BIA 1992).

(WAIVER OF INADMISSIBILITY)

Turning to the respondent's application for a section 212(c) waiver, we note that the single issue before us is whether the merits that relief as a matter of discretion. *See Matter of Edwards*, Interim Decision 3134 (BIA 1990); *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). His statutory eligibility has not been contested.

In balancing the various discretionary considerations in the respondent's case, we take note of the following positive equities. As a primary matter, he has lived in this country since approximately 1978 and he was granted

lawful permanent resident status in 1981. Moreover, he has strong family ties in the United States, including a United States citizen child, a lawful permanent resident mother, and a lawful permanent resident sister. (While he also is married to a United States citizen, the weight of this factor is undercut by the fact that he is separated from his spouse.) Further, we consider that the respondent has a history of employment and that he apparently owns an interest in a gem business. With respect to the issue of rehabilitation, we acknowledge that he appears to have served his prison sentence without incident, that he was employed during his confinement, and that he has abided by the terms of his parole. Finally, while we have previously determined that the respondent does not face a well-founded fear of persecution in Sri Lanka, *see supra* at pp. 3-4, it is evident that the country is currently embroiled in a civil war. *See generally Matter of T-, supra.* On a cumulative basis, we find that these equities rise to the level of the unusual and outstanding.

Nevertheless, the respondent's 1981 controlled substance trafficking conviction is a grave offense. The insidious effect that such crimes have on our society has been consistently recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between controlled substance violations and other offenses. *See, e.g., Matter of Gonzalez, supra,* at 684. While the respondent has sought to minimize his role in the conspiracy, we cannot ignore the fact that the United States district court judge who presided over the criminal proceedings saw fit to impose a stern 10-year prison sentence. We point out that he was arrested by agents of the Drug Enforcement Agency in July 1981, only some 5

months after being granted lawful permanent resident status in this country.

Consequently, upon de novo review, we find that the respondent does not merit a section 212(c) waiver as the negative factors outweigh the favorable equities in his case. *See Matter of Edwards, supra,* at 7 ("[t]here are cases in which the adverse considerations are so serious that a favorable exercise of discretion is not warranted even in the face of unusual or outstanding equities").

Accordingly, the appeal is dismissed.

/s/ Mary Maguire Dunne
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
New Orleans, Louisiana

File No.: A 36 930 038

August 24, 1988

In the Matter of	)	IN DEPORTATION
AJITH KUMAR SENANAYAKE	)	PROCEEDINGS
	)	(Received
Respondent	)	Jan. 2, 1990)

CHARGE: Section 241(a)(11), Immigration and Nationality Act, in that you have at any time been convicted of conspiracy to violate any law or regulation relating to illicit possession of a narcotic drug, to whit [sic] opium, in violation of Title 21, United States Code, Section 846.

APPLICATIONS: Waiver of excludability pursuant to Section 212(c), Immigration and Nationality Act.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Lawrence B. Fabacher, II 833 Baronne Street New Orleans, Louisiana 70113	Philip Law INS Trial Attorney On Detail to New Orleans, Louisiana

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 32-year-old married male native and citizen of Sri Lanka. Pursuant to Order to Show Cause (Exhibit Number 1) dated 16 June 1982, the respondent is

charged with deportability as charged above. The respondent appeared today, admitted the allegations in the Order to Show Cause, and conceded deportability. The respondent asked for relief from deportation under the provisions of Section 243(h), 208, of the Immigration and Nationality Act and under a waiver pursuant to Section 212(c) of the Immigration and Nationality Act.

Now, for the purposes of the record, there was a previous hearing in regarding this case in which the respondent had a hearing in regarding the asylum and withholding of deportation. The relief was denied under those provisions and the respondent was ordered deported on approximately the 6th day of October, 1987. The respondent filed appeal; the appeal never reached the Court; and in the interim, the Oakdale Alien Detention Facility burned to the ground to include the court building and all the records in this case were destroyed. The respondent filed a motion to reopen the proceedings, which is Exhibit Number 3, and at that time the case again came to light. With that he filed an I-191, which is Exhibit Number 2. The motion to reopen was granted and the hearing is today on the 191. The respondent's counsel will file . . . or has a date to file a 589 by the 26th of September 1988 and there will be a hearing *de novo* on the asylum application, if necessary, on the 1st day of December, 1988.

The hearing held on the 24th of August, 1988, was held on the merits of the 212(c) application in New Orleans, Louisiana. At that hearing, the respondent testified substantially as follows. That he was born in October 1955; that he arrived in the United States the first time in 1975 on a merchant ship. He later married an American

citizen and as a result of that marriage, there is one child born of that marriage. Exhibit Number 4 shows that the respondent's child, a boy, born in New Orleans, Louisiana, at Lakeside Hospital, and of course is a United States citizen child. The respondent and his wife are now separated. He points out that the wife wants to reconcile, however, this has not been resolved at the present moment. The respondent's child resides with the wife and he sees the child approximately once or twice a month. He points out that she hinders his seeing the child as a result of the conviction and also by the fact that he's what would be called "a foreigner" and that he attributes her reluctance to let him see the child because of the fact that he may take the child to the foreign country, which has been a common occurrence in the United States in the past years, and so that's why he attributes her reluctance to let him see the child. The respondent stated that he supports his child and he loves his child. He states that he supports himself because he is a gem-cutter, works with stones, and is also a broker of gems. He states that he has a mother who lives in the United States in Kansas City with a sister and both are legal permanent residents. He states that his father was assassinated in his homeland of Sri Lanka. The respondent does have a criminal record, but he has no other convictions except that offense for the possession with intent to distribute opium. The respondent pointed out that he had pled guilty to that offense, however his lawyer informed him that he was the least culpable of the group and that he would probably receive a sentence of probation. This was not the case. He went to Court, pled guilty, and received a sentence of ten years, and he served approximately three years and four

months. He points out that he had an exemplary record while in the Federal Penitentiary System. He has been released in 1984 and has received probation, which will probably carry him through 1991.

The next witness to testify was Mr. Johnny C. Moore, who is an attorney who is practicing law in Baton Rouge, Louisiana. He has practice [sic] for 12 years. He took over the law practice of an individual named Mr. William Hawk Daniels, who represented the respondent at his earlier criminal proceedings. He points out that he discussed the case with Mr. Daniels and Mr. Daniels did inform him that he told the respondent, of course you never know what you will get from a judge or a jury, but he did not think that the respondent would get jail time as a result of his minimal participation in the act for which he was convicted. Mr. Daniels has subsequently died and is, of course, not available.

The respondent also pointed out during his testimony that he was a Buddhist and does not own real estate in the United States.

Now, Section 212(c) of the Immigration and Nationality Act provides in pertinent part that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily, not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years may be admitted at the discretion of the Attorney General without regard to certain specified grounds of excludability, enumerated in Section 212(c) of the Act. Grounds specifically include drug offenses. Now, it has been determined that since the original enactment of 212(c), that a resident need not

depart the United States to avail himself of this remedy. The 212(c), however, is not an indiscriminate waiver. Instead, the Attorney General or his representatives are required to determine as a matter of discretion whether the applicant warrants the relief sought. The applicant bears the burden of demonstrating that his application is meritorious or should receive favorable consideration. There must be a balancing of the adverse factors evidencing an alien's undesirability as a permanent resident against the social and humane considerations presented in his favor. The Board has identified numerous factors to be considered in determining whether or not to grant relief under Section 212(c). Among the factors deemed adverse to an applicant and the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violation of this country's Immigration law, existence of criminal record, and if so, its nature, recency [sic], and seriousness and the presence of other evidence indicative of the appellant's bad character or undesirability as a permanent resident of this country. See *Matter of Marin*, 16 I&N 581 (1978). Favorable factors must also be considered, such as family ties within the United States, residence of long duration in this country, evidence of hardship to an alien or an alien's family if deportation occurs, history of employment, existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character. Additionally, an alien may be required to demonstrate unusual or outstanding equities upon consideration of the nature and unfavorable factors in the record.

Now, the respondent has indeed been convicted of a very serious offense. The respondent has been convicted of conspiracy to possess with intent to distribute opium. The respondent was given a sentence of ten years in which he served approximately three years and four months. The sentence itself is evidence that the offense itself was indeed considered serious by the judge, and as everyone knows, drugs have a debilitating effect on society or have almost become a [sic] epidemic striking society in today's America. Indeed, drugs have, as I stated, reached almost epidemic proportion. Every day, one reads in the newspaper about athletes overcome with overdoses, such media stars are in their careers, and indeed, even mayors and law people in law enforcement have their lives affected by the illicit use of these serious, serious drugs that have infected America. So, by no circumstances can such conduct be overlooked and is indeed a very serious matter to be considered by the Court.

Now, the favorable factors also are to be considered by the Court, such as family ties within the United States. It appears that all his family does live in the United States. The respondent has a wife, although he is separated, they have a child. He has a mother who lives in Kansas City and he also has a sister which she resides with in [sic] Kansas City. Although the respondent has not had a long duration in the United States, he has been here for the appropriate seven years. The respondent, of course, and the family would suffer some hardship if the respondent were deported, and that hardship, of course, would be the fact that the respondent would be separated from his child and his mother. Now, of course, this is a

hardship that anyone would suffer due to separation, but it does not appear to be such a hardship that would be unbearable. Now, the respondent does appear to have a history of employment. He has long been employed either as a merchant marine or as working with gems or has kept himself busy. Even when in prison, he worked in the accounting portion of the industries of the Federal Penitentiary System and appears to have been gainfully employed throughout his period in the United States. Now, the respondent is now involved in a gem business in which he travels throughout the country. True, he does not have any real property. There was some real property, but it appears to have been that of his wife and his wife's family.

Now, after considering the advantages and disadvantages, or the plus and minus factors submitted by both parties, it is noted that the respondent is indeed an adult. He is approximately 33 or 34 years of age. And when he committed this offense, he was approximately 30 to 31 years of age. So it was not an offense that was committed by a 16-year-old child or a 19-year-old just starting upon adult life. Indeed, the respondent knew the consequences or should have known the consequences, and the offense of which he has been convicted is an extremely serious offense and, accordingly, after my reviewing of the entire record, I find that the negative factors concerning the offense and its nature and seriousness, that it outweighs the good factors brought forth by the respondent. And I do not think that there is a hardship that would be an unusual hardship that would result. True, it would cause some problems, but certainly not one that the respondent could not overcome. Again, I would think that in this

particular case, the alien would be required to demonstrate some unusual or outstanding equities, and upon review of the entire case, I cannot find that there are any that deserve discretionary relief.

And, accordingly, I must deny the requested relief. And I deny relief under the provisions of Section 212(c) and accordingly would order, ordinarily, that the respondent would be deported from the United States to Sri Lanka. But the respondent still has a possibility of relief that he may file for, and that of course is the asylum and withholding of deportation.

ORDER

So I deny the relief under Section 212(c) and I would withhold the deportation and the respondent may submit his 589 by the 26th day of September, 1988, and then we will have a hearing on the remaining aspects, the application for 208 and 243(h), on the 1st day of December, 1988, at 8:30 in the morning in New Orleans.

/s/ R. Kevin McHugh
R. Kevin McHugh
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
New Orleans, Louisiana

File No.: A 36 930 038 December 1, 1988

In the Matter of	)	
AJITH KUMAR SENANAYAKE	)	IN DEPORTATION PROCEEDINGS
Respondent	)	

CHARGE: Section 241(a)(11), Immigration and Nationality Act, in that you at any time have been convicted of a conspiracy to violate any law or regulation relating to the illicit possession of narcotic drugs, to whit [sic] opium, in violation of Title 21, United States Code, Section 846.

APPLICATIONS: Political asylum, withholding of deportation pursuant to Section 243(h) of the Immigration and Nationality Act, in the alternative voluntary departure.

ON BEHALF OF RESPONDENT:

Lawrence B. Fabacher, II
833 Baronne Street
New Orleans, Louisiana
70113

ON BEHALF OF SERVICE:

Richard Robinson
INS Trial Attorney
New Orleans, Louisiana

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 33-year-old male, married, separated father of a United States citizen and he is a native and citizen of Sri Lanka. Pursuant to Order to Show Cause, Exhibit Number 1, the respondent is alleged to have entered the United States February 19, 1981, and at that time, was admitted as an immigrant and the respondent is charged with 6 November 1981 being convicted in United States District Court for conspiracy to possess with intent to distribute opium in violation of Title 21 United States Code, Section 846.

The respondent appeared at an earlier hearing on the 24th day of August, 1988, at which time the respondent admitted the allegations in the Order to Show Cause and conceded deportability. The respondent was found deportable and the respondent asked for relief from deportation in the form of 212(c), political asylum, and withholding of deportation under provisions of 208, 243(h) of the Immigration and Nationality Act, and also under 244(e).

The hearing on the 212(c) application took place on the 24th day of August, 1988, and a decision at that time was reached. The respondent reserved appeal from that decision.

On the 1st day of December, 1988, a hearing was held in New Orleans, Louisiana, on the 208, 243(h), and 244(e) aspects of the case.

For the purposes of the record, Exhibit Number 1 is an Order to Show Cause. Exhibit Number 2 is an I-191. Exhibit Number 3 is a motion to reopen. Exhibit Number

4 is the birth certificate of the respondent's child. Exhibit Number 5 is the 589. Exhibit Number 6 is the BHRA letter dated 4 November 1988. Exhibit Number 7 is a 589 submitted on 22 September of 1988. And Exhibit Number 8 is a BHRA letter dated 6/16/1987.

It is noted for the purposes of the record that this case had a prior hearing in 1987 on the asylum application and after that hearing, the facility in which the records were housed was burned to the ground in Oakdale, Louisiana, and all the records were destroyed. When the respondent filed additional paperwork, the case again came to light and the proceedings were reinstituted with the copy of the Order to Show Cause and a number of these records in the file are copies and they are copied from the Government file.

Now, as I stated, a hearing on the relief application took place on the 1st day of December, 1988, in New Orleans, Louisiana. At that hearing the respondent testified that he has lived in the United States since 1978 and he got legal permanent resident status in 1981. He is married to a United States citizen, has one child. In 1981 he was also convicted of conspiracy to possess with intent to distribute opium. The respondent was found guilty of that charge and sentenced to ten years. However, he served three years and four months and was then put on probation. The respondent is now still on probation.

The respondent testified that when he grew up in Sri Lanka, his father was an active member of one of the political parties in Sri Lanka and that party is the UNP party. The respondent testified that his father had been a

member of the parliament and ever since they had independence, his father was politically active. He also states that his family is a politically prominent family throughout the country. The UNP party stands for the United National Party and is one of the two major parties in the country. The respondent pointed out that in 1969 his father was poisoned, and he and his mother and his family believe that the JVP, which is a political party which is outlawed in his homeland, was responsible for his death. The respondent states that this party, the JVP party, seeks to overthrow the established party and the government of his homeland. The respondent pointed out that when he lived in Badulla Province, the respondent went to college there and he became active in the student affairs and was president of the student union. He stated that during this time he knew many terrorists and communists and members of the JVP party and he reported these members of the communist party and the JVP party to his brother-in-law, who is a member of the parliament, and also to the police and to a major in the army, which was in that province. He stated that, as a result, numerous members of this JVP party and communist party were arrested and executed, or killed. He stated, as a result of his actions, many people know that he was the one who turned these people in, thus he is in danger. He stated that in one particular year in 1972, the respondent and another individual were driving in Badulla Province and the van in which they were riding was shot at. He feels that it was the JVP that was responsible for this. He states that another time he and a friend of his were kidnapped while they were hunting and they were held

in cages for approximately two days. When the authorities came looking for them they were able to escape after they had been tortured. And he states that the time is uncertain, but approximately a year-and-a-half to two years later, respondent left the country to join the merchant marine and he ultimately came to the United States. The respondent stated that when he was kidnapped and held, he was questioned and interrogated and tortured. And he states that he is afraid to return to his homeland. He feels that his early demise will happen as a result of his political prominence and his family's political prominence and also the fact that he turned in these people who were members of the JVP party. The respondent also states that he has a brother who lives there is a member of the police force in his homeland and he also has four sisters who live there, and he has not heard from his brother in approximately seven months and his brother is a policeman.

The next witness was the respondent's mother. She stated that her husband had been killed in 1969, poisoned by the, she believes, to be the JVP party. And she points out that her son was active and that he was shot at once and that also he was kidnapped once, and she fears that if he returns they do not know what will happen to him, but fears for his safety. And she pointed out that she has family members who are now in Sri Lanka but none of them are politically active.

Now, in order to establish eligibility for withholding of deportation pursuant to Section 243(h) of the Act, an alien must show a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social

group, or political opinion. The alien must show that it is more likely than not that he or she would be subject to persecution on one of the grounds specified.

Now, for asylum under Section 208 of the Act, must meet the definition of a refugee, which requires him or her to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion. This statutory standard requires the alien to show that he or she possesses a well-founded fear of persecution by establishing that a reasonable person in his circumstances would fear persecution if they were to be returned to his native country.

Now, in this particular case, the respondent bases his application for asylum upon the fact that, one, his father was a founding member of the political party and was politically active and prominent and all his family has been prominent; also the fact that respondent has turned in members of the outlawed JVP party and his father was assassinated by this party and he fears that he too will be assassinated if he returns, or killed; and therefore, he asks for asylum.

Now, the respondent does bear the burden of proof for both asylum and withholding applications. Now, in this particular case the respondent's story appears to be that he was shot at once and he was kidnapped. The respondent concluded, without further substantiation, that he was shot at by members of the JVP party. However, there was no explanation or no substantiation on why this was so, or the possibility of the other individual who was driving the van and whose van it was very well

may have been the victim of the gunshot, or it could very well have been an innocent gunshot. But, the respondent points out that it was a JVP party, but without any substantiation of that. The respondent then point out that he was persecuted in the fact that he was kidnapped and detained for approximately two to four days, at which time he was questioned and it was also pointed out that he came from a wealthy family. And the Court questions whether the kidnapping was a result of coming across him just inadvertently and whether they were detaining him for his money or for his political party; the answers are not clear. But in any event, the respondent seemed to live in that country for approximately 18 months to two years after the kidnapping, at which time the respondent was not further bothered. The respondent points out that at this particular time the party was not active and states that if he returned now, because of their activity, he would be in danger, and thus asks that he not be returned and granted asylum in this country.

Now it is noted that there is a civil war going on in that country right now, however, it's mostly between the Tamils and the ruling party. In a review of the State Department, the *Country Reports on Human Rights Practices* for 1987, there's much discussion on the Tamils and the TUL's, Tamil United Liberation Party, and other parties, mostly Tamils. And the JVP party is mentioned but once in the entire section on Sri Lanka. And thus the Court questions whether the JVP party is as prominent as the respondent gives credit for being. It is also noted that in the State Department report it is pointed out that this party is prohibited from existing and they fail to mention whether it has any terrorist activities or terrorist elements

within the party, but in any event, it does not seem worthy of note by the State Department. In this case, also it is noted that the respondent has a number of sisters who lived in that country and evidently nothing has happened to them, as there is no allegations either by the mother or the son that these sisters are in danger, and it was pointed out to one of these sister's husband was a member of parliament. It's also noted that the brother who lives in Sri Lanka is a policeman and evidently been a policeman for a number of years, and although they have not heard of them for seven months, no allegations have been made that he has been assassinated or anything like that. And thus the Court questions whether the respondent's prominence in politics and being a member of a party that is opposed to the JVP party is real or in fact exists only in the mind of the respondent.

In the Court's opinion, the respondent has not met his burden of proof. There is absolutely no evidence whatsoever that the respondent has been persecuted. He has been picked up while he was on a hunting party, a hunting foray, but there was no vivid descriptions of this when asked to explain the details. The answers were certainly not clear and coherent. The answers were fuzzy and left little description of how the respondent fell into the hands of the kidnappers. The random shot into a vehicle certainly does not prove by any means any persecution. And the Court concludes that the respondent has failed to show that he has been persecuted in the past and that he has any reason for persecution in the future. A reasonable person in the respondent's shoes would not fear persecution. Furthermore, the five grounds that are stated in 208 and 243(h) certainly have not, you know, the

fact that an individual has been politically active years ago without further testimony and proof would certainly not establish a case under 243(h) or 208. Basically, the Court concludes that the case falls woefully short of the standards and I find that there has been no persecution in the past and that there would be no persecution in the future and that there is a reasonable person in the respondent's shoes would not fear persecution if he returned to his homeland.

Therefore, I deny relief under 208 and 243(h). Because of the respondent's conviction in Federal court, I would also deny voluntary departure. And accordingly:

ORDER

IT IS THE ORDER of the Court that the respondent be deported from the United States to his native country of Sri Lanka on this 1st day of December, 1988.

/s/ R. Kevin McHugh
R. KEVIN McHUGH
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
OAKDALE, LA

File: A 36-930-038
In DEPORTATION Proceedings

In the Matter of:
SENANAYAKE,
AJITH KUMAR

Order of the
Immigration Judge

This is a summary of the Oral Decision and Order entered on 12/01/88. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

X The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to Sri Lanka.

_ Respondent's application for Voluntary Departure was granted to on or before ___ with an alternated Order of Deportation to

X Respondent's application for ASYLUM was Denied. WITHHOLDING OF DEPORTATION was Denied.

X A waiver under Sec. 212 (c) was Denied, RKM.

_ The Respondent was Granted/Denied adjustment of status.

_ The Respondent's application for suspension of deportation is hereby Granted/Denied.

_ The proceedings were terminated.

_ The Respondent was ordered deported to

X Appeal reserved/waived by Service/Respondent. Notice of Appeal to be filed no later than 12 Dec. 1988.

_ Other _____

_____.

Date: 11/22/88

/s/ R. Kevin McHugh
R. Kevin McHugh
Immigration Judge 12-1-88

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